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8  
9 **UNITED STATES DISTRICT COURT**  
10 **DISTRICT OF NEVADA**

11 STRIKE 3 HOLDINGS, LLC,  
12 Plaintiff,

13 vs.

14 JOHN DOE subscriber assigned IP address  
70.189.203.216 ,  
15 Defendant.  
16

Case Number: 2:18-cv-01541-KJD-NJK

**RENEWED EX PARTE MOTION FOR  
LEAVE TO SERVE A THIRD PARTY  
SUBPOENA PRIOR TO A RULE 26(f)  
CONFERENCE**

17 Pursuant to the Federal Rules Civil Procedure 26(d)(1), Strike 3 Holdings, LLC (“Strike  
18 3” or “Plaintiff”) respectfully moves for entry of an order granting it leave to serve a third party  
19 subpoena on Cox Communications prior to a Rule 26(f) conference (the “Motion”). The Motion  
20 is based on the foregoing Memorandum of Points and Authorities and is supported by the  
21 declarations of Greg Lansky (“Lansky Declaration”), Tobias Fieser (“Fieser Declaration”), John  
22 S. Pasquale (“Pasquale Declaration”), and Susan B. Stalzer (“Stalzer Declaration”), all of which  
23 are filed concurrently herewith. A proposed order is also submitted concurrently herewith for the  
Court’s convenience in compliance with LR IA6-2.

24 Dated this 2<sup>nd</sup> of October, 2018.

**FOX ROTHSCHILD LLP**

25 By: /s/ Kevin M. Sutehall  
26 KEVIN M. SUTEHALL (9437)  
MARK J. CONNOT (10010)

27 *Attorney for Plaintiff Strike 3 Holdings, LLC*  
28

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S  
RENEWED EX PARTE MOTION FOR LEAVE TO SERVE A THIRD PARTY  
SUBPOENA PRIOR TO A RULE 26(f) CONFERENCE**

Pursuant to Fed. R. Civ. P. 26(d)(1), Plaintiff hereby respectfully submits this Memorandum of Points and Authorities in support of its Motion for Leave to serve a third-party subpoena prior to a Rule 26(f) conference.

**I. INTRODUCTION**

Plaintiff is the owner of original, award winning motion pictures featured on its brand's subscription-based adult websites.<sup>1</sup> Unfortunately, Strike 3's success has led users on the Internet to illegally infringe its works on a very large scale. Indeed, Strike 3's motion pictures are among the most infringed content in the world. *See* Lansky Declaration.

Strike 3 hired an investigator, IPP International U.G., to monitor and detect the infringement of Strike 3's content. IPP discovered that Defendant's IP address was illegally distributing several of Strike 3's motion pictures. Strike 3's independent forensic expert, John S. Pasquale reviewed the evidence captured by IPP and confirmed that Defendant's IP address was involved in an infringing transaction at the exact date and time reported by IPP. *See generally* Pasquale Declaration. Strike 3 only knows Defendant by his or her IP address. This IP address is assigned to Defendant by his or her Internet Service Provider ("ISP"), which is the only party with the information necessary to identify Defendant by correlating the IP address with John Doe's identity. As a result, Plaintiff now seeks leave to serve limited, immediate discovery on Defendant's ISP, Cox Communications, Inc. (Cox Communications) so that Plaintiff may learn Defendant's identity, investigate Defendant's role in the infringement, and effectuate service. Further impelling expediency, Defendant's ISP only maintains the internal logs of the requested information for a brief period of time.<sup>2</sup>

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<sup>1</sup> *See* Lansky Declaration.

<sup>2</sup> *See, e.g.*, Statement Of Jason Weinstein Deputy Assistant Attorney General Criminal Division Before The Committee On Judiciary Subcommittee On Crime, Terrorism, And Homeland Security United States House Of Representatives, (January 2011) at <http://www.justice.gov/sites/default/files/testimonies/witnesses/attachments/01/25/11//01-25-11-crm-weinstein-testimony-re-data-retention-as-a-tool-for-investigating-internet-child-pornography-and-other-internet-crimes.pdf>, stating: "Some [ISP] records are kept for weeks or months; others are stored very briefly before being purged."

1 Plaintiff seeks leave of Court to serve a Rule 45 subpoena on Defendant's ISP. This  
2 subpoena will only demand the true name and address of Defendant. Plaintiff will only use this  
3 information to prosecute the claims made in its Complaint. Without this information, Plaintiff  
4 cannot serve Defendant nor pursue this lawsuit and protect its copyrights.

## 5 II. FACTS

### 6 A. Plaintiff Is Plagued By Rampant Copyright Infringement

7 Greg Lansky ("Mr. Lansky") is a member of General Media Systems, LLC, ("GMS"),  
8 the parent company that owns Strike 3. *See* Lansky Declaration, at ¶ 1. Strike 3 owns the  
9 intellectual property to the *Blacked*, *Blacked Raw*, *Tushy*, and *Vixen* adult brands, including the  
10 copyrights to each of the motion pictures distributed through the brands' sites and the  
11 trademarks to each of the brand names and logos. *Id.* at ¶ 3. Strike 3 is owned entirely by Mr.  
12 Lansky's company, GMS, and has existed since 2015. *Id.*

13 Mr. Lansky is the Chief Creative Officer of the *Blacked*, *Blacked Raw*, *Tushy*, and *Vixen*  
14 adult brands. *Id.* at ¶ 1. In 2006, Mr. Lansky moved to the United States from Paris to pursue  
15 his dream of creating art in an adult context. *Id.* at ¶ 4. He has always been passionate about  
16 photography and cinematography. *Id.*

17 It was a difficult start – Mr. Lansky could barely speak English, and he had trouble  
18 making connections and finding employment. *Id.* at ¶ 5. Eventually, after tremendous hard  
19 work, Mr. Lansky was fortunate to be hired by some of the biggest adult brands in the world.  
20 *Id.* at ¶ 6. Through these experiences, Mr. Lansky was able to establish himself and become an  
21 expert in the field. *Id.*

22 In 2013, Mr. Lansky decided to risk everything to create his own company and studio.  
23 *Id.* at ¶ 7. After a few years, his brands turned into a multi-million dollar a year business. *Id.* at  
24 ¶ 10. His philosophy is to pay artists and models an amount above that being paid by other  
25 companies, focusing on delivering superior quality adult films. *Id.* at ¶¶ 12–13. Moreover,  
26 Strike 3's motion pictures are known for having the highest production budget of any in the  
27 industry. *Id.* at ¶ 15.

1 Because of this, Strike 3's brand's websites have a subscriber base that is one of the  
 2 highest of any adult sites in the world, with 20 million unique visitors to its websites per month,  
 3 these websites enjoy a loyal following. *Id.* at ¶ 10. Strike 3 is also currently the number one  
 4 seller of adult DVDs in the United States. *Id.* at ¶ 17. Finally, Strike 3's content is licensed  
 5 throughout the world, including by most major cable networks. *Id.* at ¶ 18. This success has led  
 6 to numerous awards being bestowed upon Strike 3, such as "adult site of the year," "best  
 7 marketing campaign – company image," and "best cinematography." *Id.* at ¶ 19. Mr. Lansky  
 8 himself has also won "director of the year" three years in a row. *Id.*

9 Unfortunately, piracy is a major threat and causes tremendous damage to Strike 3. As  
 10 Mr. Lansky succinctly puts it, Strike 3 "can compete in the industry, but we cannot compete  
 11 when our content is stolen." *Id.* at ¶ 22. To continue to provide value for members, exciting  
 12 and inspiring projects for adult performers, and to continue to create top paying jobs and growth  
 13 in the adult community, Strike 3 must protect its copyrights. *Id.* at ¶ 29.

14 **B. Plaintiff Brings Its Litigation in Good Faith**

15 Strike 3 is mindful of the nature of the litigation and its goal is to not embarrass anyone  
 16 or force anyone to settle unwillingly, especially anyone that is innocent. *Id.* at ¶ 28. Therefore,  
 17 Strike 3 only files strong cases against extreme infringers. *Id.* at ¶ 29. Indeed, each lawsuit is  
 18 brought against infringers that not only engage in illegal downloading, but are also large scale  
 19 unauthorized distributors of Strike 3's content. *Id.* All defendants within the Strike 3 litigation  
 20 have distributed, at a minimum, at least 15% of Strike 3's entire copyrighted library. *Id.* Strike  
 21 3 does not seek settlements unless initiated by defendant or defendant's counsel. *Id.* at ¶ 30.  
 22 Moreover, Strike 3 does not send demand letters nor make any attempt to contact a defendant  
 23 prior to service of the Complaint. *Id.* Strike 3 is careful to only proceed to litigation with  
 24 strong cases, when it has a good faith basis for doing so. *Id.* at ¶ 31.

25 Strike 3 is a successful adult entertainment company that makes nearly all of its revenue  
 26 from sales of subscriptions, DVDs, and licenses. *Id.* at ¶ 32. This litigation, or any litigation  
 27 instituted by Strike 3, is not a business model. *Id.* Instead, Strike 3's goal is to deter piracy and  
 28

1 redirect the infringement back into legitimate sales. *Id.* Proceeds that Strike 3 receives from  
 2 settlements go back into making the company whole, including investing in better pay for artists  
 3 and performers, better quality productions, and hiring and providing benefits for employees. *Id.*

### 4 **III. ARGUMENT**

#### 5 **A. Legal Standard Governing Expedited Discovery Requests To Identify An** 6 **Anonymous Defendant**

7 “[T]his is precisely the type of case for which expedited jurisdictional discovery is often  
 8 appropriate, because plaintiff is ignorant of . . . the identity” of Doe Defendant. *808 Holdings*  
 9 *LLC v. Collective of Jan. 3, 2012 Sharing Hash*, No. CV 12-2251-CAS (EX), 2012 WL  
 10 13012725, at \*5 (C.D. Cal. Oct. 1, 2012). “[Fed. R. Civ. P. 26(d)] provides that parties may  
 11 depart from the meet and confer requirements of Rule 26(f) with the Court's authorization.”  
 12 *Voltage Pictures, LLC v. Unknown Party*, No. CV-13-728-PHX-SMM, 2013 WL 12174691, at  
 13 \*1 (D. Ariz. July 15, 2013). “The Ninth Circuit has held that when the defendants' identities are  
 14 unknown at the time the complaint is filed, courts may grant plaintiffs leave to take early  
 15 discovery to determine the defendants' identities unless it is clear that discovery would not  
 16 uncover the identities, or that the complaint would be dismissed on other grounds.” *QOTD Film*  
 17 *Inv. Ltd. v. Does I-30*, No. CV 2:16-00928-APG-GWF, 2016 WL 8735619, at \*2 (D. Nev. May  
 18 6, 2016) (referencing *Gillespie v. Civiletti*, 629 F.2d 637, 642 (9th Cir. 1980)). “To determine  
 19 whether to grant a request for early discovery, the court shall apply the conventional ‘good  
 20 cause’ standard that weighs the need for discovery to further justice against the prejudice to the  
 21 opposing party.” *Id.* (citing *Semitoool, Inc. v. Tokyo Electron Am., Inc.*, 208 F.R.D. 273, 275–76  
 22 (N.D. Cal. 2002)).

23 “Courts in this district apply a three-factor test when considering motions for early  
 24 discovery to locate certain defendants.” *Id.* (citing *Semitoool, Inc. v. Tokyo Electron Am., Inc.*, 208  
 25 F.R.D. 273 (N.D. Cal. 2002)). These include:

- 26 (1) whether the plaintiff has identified the unknown party with such specificity
- 27 that the court can determine that the defendant is a real person or entity who may
- 28 be sued in federal court; (2) whether the plaintiff has made a good faith effort to

1 identify the unknown defendant and identified all previous steps taken to do so;  
2 and (3) whether the plaintiff's suit could withstand a motion to dismiss.

3 *Voltage Pictures*, No. CV-13-728-PHX-SMM, 2013 WL 12174691 at \*1 (citing *Columbia*  
4 *Ins. Co. v. seescandy.com*, 185 F.R.D. 573 (N.D. Cal. 1999)). “Typically, District Courts  
5 within the Ninth Circuit have found good cause supporting a request for early or expedited  
6 discovery in copyright infringement cases where the plaintiff alleges that its copyrighted  
7 work has been infringed upon through a peer-to-peer file sharing system, and sought early  
8 discovery to obtain the identities and addresses of the alleged infringers through their  
9 respective ISPs.” *QOTD Film*, No. CV 2:16-00928-APG-GWF, 2016 WL 8735619 at \*2  
(collecting cases).

10 **B. There Is Good Cause for this Court to Grant Plaintiff's Application for Leave**  
11 **to Serve Its Subpoena**

12 ***1. Plaintiff Identifies Doe Defendant with Sufficient Specificity***

13 When evaluating an application for leave to take early discovery “the Court examines  
14 whether the plaintiff has identified the defendants with sufficient specificity, demonstrating that  
15 each defendant is a real person or entity who would be subject to the Court's jurisdiction.”  
16 *Distinct Media Ltd. v. Doe Defendants 1-50*, No. CV 15-03312 NC, 2015 WL 13389609, at \*2  
17 (N.D. Cal. Sept. 29, 2015) (citation omitted). This factor implies two inquiries: whether the  
18 infringement can be traced back to an actual person and whether this Court has personal  
19 jurisdiction over that individual.

20 ***a. Plaintiff has Sufficiently Demonstrated that the Infringement Conducted Using***  
21 ***the Relevant IP Address was Committed by an Actual Person***

22 “A plaintiff may show that a defendant is a real person or entity by providing evidence  
23 of ‘specific acts of misconduct that could only have been perpetrated by actual people, as  
24 opposed to a mechanical process.’” *Id.* (quoting *G.N. Iheaku & Co. Ltd. v. Does 1-3*, No. CV  
25 14-02069 LB, 2014 WL 2759075, at \*2 (N.D. Cal. June 17, 2014)). Although the BitTorrent  
26 protocol contains some default and automatic functions, none of these operations can take place  
27

1 without human interaction. That is, but for the Doe Defendant directing his or her BitTorrent  
2 client to download the torrent file, the alleged infringement would not have occurred.

3 *b. Plaintiff Traced Doe Defendant's IP Address to this Court's Geographic*  
4 *Jurisdiction Using Geolocation Technology*

5 “[A] plaintiff identifies Doe defendants with sufficient specificity by providing the  
6 unique IP addresses assigned to an individual defendant on the day of the allegedly infringing  
7 conduct, and by using ‘geolocation technology’ to trace the IP address to a physical point of  
8 origin.” *QOTD Film*, No. CV 2:16-00928-APG-GWF, 2016 WL 8735619 at \*2 (quoting 808  
9 *Holdings, LLC v. Collective of Dec. 29, 2011 Sharing Hash*, 2012 WL 1648838, at \*4 (S.D.  
10 Cal. May 4, 2012)). Here, Plaintiff used Maxmind, a geolocation technology, to trace  
11 Defendant’s IP address to a geographic area within this Court’s in personal jurisdiction. This  
12 establishes “a prima facie showing of personal jurisdiction over defendant.” *AF Holdings LLC*  
13 *v. Doe*, No. CV 12-04447 RMW, 2012 WL 12973140, at \*2 (N.D. Cal. Nov. 6, 2012); *see also*  
14 *Braun v. Doe*, No. CV 12-3690 YGR (JSC), 2012 WL 3627640, at \*2 (N.D. Cal. Aug. 21,  
15 2012) (noting that “[p]ublicly available software provides basic, or at least presumptive,  
16 geographic information about IP addresses”)) (citation omitted).

17 Other courts in this Circuit have accepted Maxmind’s findings for the purpose of  
18 allowing expedited discovery. *See e.g., Strike 3 Holdings*, No. CV 17-2317-JAH (BLM), 2017  
19 WL 6389848, at \*2; *Cell Film Holdings, LLC v. Doe*, No. CV 16-2584-BEN (BLM), 2016 WL  
20 6523432, at \*2 n.2 (S.D. Cal. Nov. 3, 2016), *Criminal Prods., Inc. v. Doe*, No. CV 16-2589  
21 WQH (JLB), 2016 WL 6822186, at \*3 (S.D. Cal. Nov. 18, 2016) (“The Court concludes that  
22 based on the timing of the IP address tracing efforts employed by Plaintiff’s investigator, the  
23 documented success of the Maxmind geolocation service, and Plaintiff’s counsel’s efforts to  
24 independently verify the location information provided by Plaintiff’s investigator, Plaintiff has  
25 met its evidentiary burden [that jurisdiction is proper].”). Indeed, federal law enforcement relies  
26 on Maxmind for its cyber investigations. *See e.g., United States v. Tillotson*, No. CR 2:08-33,  
27 2008 WL 5140773, at \*6 (E.D. Tenn. Dec. 2, 2008) (Department of Justice); *United States v.*



1 *Richardson*, No. CR 4:11-3116, 2012 WL 10382 at \*2 (D. Neb. Jan. 3, 2012), *report and*  
 2 *recommendation adopted*, No. CR 4:11-3116, 2012 WL 395509 (D. Neb. Feb. 7, 2012) (Federal  
 3 Bureau of Investigation); *see also* Complaint at ¶ 9. Thus “Plaintiff has sufficiently identified  
 4 the unknown Defendant[] through their individual IP address[] such that the Court can conclude  
 5 that they are in fact real persons or entities, and because Plaintiff’s Complaint alleges claims for  
 6 federal copyright infringement, these parties may be sued in federal court. *Voltage Pictures*, No.  
 7 CV 13-728-PHX-SMM, 2013 WL 12174691 at \*2.

8 *c. Plaintiff Has Identified All Previous Steps Taken to Locate the Unknown Doe*  
 9 *Defendant*

10 “Next, Plaintiff must identify all previous steps taken to identify the Doe Defendant in a  
 11 good faith effort to locate and serve it.” *Malibu Media, LLC v. Doe*, No. CV 16-1916-GPC  
 12 (JMA), 2016 WL 6216183 at \*2 (S.D. Cal. Oct. 25, 2016) (citing *Columbia Ins. Co.*, 185 F.R.D.  
 13 at 579). Here, Plaintiff has diligently attempted to correlate Defendant’s IP address to  
 14 Defendant by searching for Defendant’s IP address on various web search tools, including basic  
 15 search engines like <http://www.google.com>. Plaintiff has further conducted its own diligent  
 16 research on its ability to identify Defendant by other means by reviewing numerous sources of  
 17 authority, most of which have been discussed above (*e.g.*, legislative reports, agency websites,  
 18 informational technology guides, governing case law, etc.). Plaintiff has also discussed the  
 19 issue at length with computer investigators and cyber security consultants. Plaintiff has been  
 20 unable to identify any other way to go about obtaining the identities of its infringers and does  
 21 not know how else it could possibly enforce its copyrights from illegal piracy over the  
 22 Internet. “This is the case because although publicly available data allowed Plaintiff to identify  
 23 the specific ISP used by Defendant as well as the city associated with the IP address, it did not  
 24 permit Plaintiff to ascertain the identity of the subscriber or actual defendant. Accordingly,  
 25 Plaintiff appears to have investigated and obtained the data pertaining to the alleged  
 26 infringement in a good faith effort to locate Defendant.” *Cobbler Nevada, LLC v. Doe-*



68.8.213.203, No. CV 15-2729-GPC (JMA), 2015 WL 9026554, at \*2 (S.D. Cal. Dec. 15, 2015).

## 2. *Plaintiff's Complaint Withstands a Motion to Dismiss*

Finally, Plaintiff's Complaint withstands a motion to dismiss. This factor acts as a gatekeeper designed to "prevent abuse of this extraordinary application of the discovery process and to ensure that plaintiff has standing to pursue an action against defendant." *Columbia Ins. Co.*, 185 F.R.D. at 579–80 (citation omitted).

As this is an action for copyright infringement, this Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331 (federal question) and 28 U.S.C. § 1338 (jurisdiction over copyright actions). *See* Complaint at ¶ 7; *see also Strike 3 Holdings, LLC v. Doe*, No. CV 3:17-02316-GPC (KSC), 2018 WL 324264, at \*3 (S.D. Cal. Jan. 5, 2018) (finding in a analogous matter that "the Complaint correctly alleges subject matter jurisdiction pursuant to Title 28"). This Court also has personal jurisdiction over Doe Defendant because the Defendant's infringement took place within the geographic scope of this Court's jurisdiction, *supra* Section B.1.b., and Defendant also likely resides within this District or at least has substantial contacts with this District. *See* Complaint ¶¶ 8–9. Venue is appropriate pursuant to 28 U.S.C. § 1391(b) and (c) as well as 28 U.S.C. § 1400(a) (venue for copyright cases). *See* Complaint ¶ 10; *see also Brayton Purcell LLP v. Recordon & Recordon*, 606 F.3d 1124, 1126 (9th Cir. 2010) ("This circuit interprets [28 U.S.C. § 1400(a)] to allow venue in any judicial district where, if treated as a separate state, the defendant would be subject to personal jurisdiction").

Finally, "[t]o survive a motion to dismiss [for failure to state a claim upon which relief can be granted], a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Plaintiff's Complaint would survive such a motion.

To make a prima facie claim for copyright infringement, Plaintiff must show (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are

original. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991). “In addition, direct infringement requires the plaintiff to show causation (also referred to as ‘volitional conduct’) by the defendant.” *Perfect 10, Inc. v. Giganews, Inc.*, 847 F.3d 657, 666 (9th Cir. 2017) (citing *Fox Broad. Co., Inc. v. Dish Network L.L.C.*, 747 F.3d 1060, 1067 (9th Cir. 2013)). Plaintiff’s Complaint accomplishes this, stating: (1) “Plaintiff is the owner of the Works, which [are] an original work of authorship”; (2) “[d]efendant copied and distributed the constituent elements of Plaintiff’s Works using the BitTorrent protocol”; and (3) “[a]t no point in time did Plaintiff authorize, permit or consent to Defendant’s distribution of its Works, expressly or otherwise.” See Complaint at ¶¶ 35–37.

Plaintiff owns a valid copyright in the Works, which are registered with the United States Copyright Office or have complete applications pending. See Complaint at ¶¶ 31–33; see also 17 U.S.C. § 410(c); *Cosmetic Ideas, Inc. v. IAC/Interactivecorp.*, 606 F.3d 612 (9th Cir. 2010). Plaintiff’s prima facie allegations of infringement are attested to by Plaintiff’s investigator, IPP International U.G.’s employee, Tobias Fieser. See Fieser Declaration. Finally, each digital file has been verified to be a copy of one of Plaintiff’s copyrighted works. See Stalzer Declaration.

Plaintiff has also made a plausible prima facie showing of “copying.” “The word ‘copying’ is shorthand for the infringing of any of the copyright owner’s five exclusive rights’ described in § 106.” *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1013 (9th Cir. 2001). Plaintiff’s Complaint alleges that Doe Defendant not only downloaded Plaintiff’s works over the BitTorrent network, see 17 U.S.C. § 106(1), but also distributed these files to the BitTorrent swarm. See *id.* § 106(3); see also Complaint at ¶ 38. Additionally, by downloading the torrent files, Defendant triggered a cascade of technical operations, making Defendant the “proximate cause” of all of the violations of Plaintiff’s copyrights. *Giganews, Inc.*, 847 F.3d at 666. “Indeed, every court to have addressed this issue has found a sufficiently alleged copyright infringement claim based on BitTorrent technology, even when the defendant was merely

1 identified with an IP address.” *Patrick Collins, Inc. v. John Doe*, 945 F. Supp. 2d 367, 375  
 2 (E.D.N.Y. 2013) (discussing the sufficiency of the complaint under Rule 12(b)(6)).

3 3. *Cobbler Nevada, LLC v. Gonzales Does Not Raise the Pleading Standard Prior to*  
 4 *Identifying the Defendant*

5 The Ninth Circuit recently issued a pair of rulings addressing (1) the pleading standard  
 6 for a plaintiff in a copyright BitTorrent action and (2) when a prevailing plaintiff is entitled to  
 7 attorneys’ fees in the same type of action. In *Cobbler Nevada, LLC v. Gonzales*, No. CV 17-  
 8 35041, 2018 WL 4055766, at \*3 (9th Cir. Aug. 27, 2018) the Ninth Circuit held that a plaintiff,  
 9 in a similar action such as here, was required to pay attorneys’ fees to the prevailing defendant  
 10 in the case because the plaintiff did not act objectively reasonable when it pursued an amended  
 11 complaint against a defendant where “[t]he only connection between [the defendant] and the  
 12 infringement was that he was the registered internet subscriber and that he was sent  
 13 infringement notices.”<sup>3</sup> *Cobbler Nevada, LLC v. Gonzales*, No. CV 17-35041, 2018 WL  
 14 4055766, at \*3 (9th Cir. Aug. 27, 2018). Thus, the Court reached this conclusion *after* the  
 15 district court permitted the plaintiff to subpoena the ISP for defendant’s identifying information,  
 16 conduct an initial investigation into defendant, and even depose defendant. *See id.* Just a few  
 17 weeks prior to releasing the *Cobbler* decision, the Ninth Circuit ruled in a similar case that  
 18 “allow[ing] copyright holders to seek limited discovery from an Internet Service Provider to  
 19 establish a potential infringer’s identity[.]” along with permitting a plaintiff to depose the  
 20 defendant early in the litigation was “practical” and “sensible[.]” *Glacier Films (USA), Inc. v.*  
 21 *Turchin*, 896 F.3d 1033, 1036 and 1038 (9th Cir. 2018).

22 Indeed, in *Cobbler*, the Ninth Circuit recognized that early discovery, such as what  
 23 Plaintiff took part in here, is “part of the puzzle” in determining the identity of the infringer and  
 24 thus such early discovery is wholly appropriate. *Cobbler Nevada, LLC v. Gonzales*, No. 17-  
 25 35041, 2018 WL 4055766 (9th Cir. Aug. 27, 2018). Thus, the District Court in *Cobbler*

26 <sup>3</sup> The Court further noted that *Cobbler Nevada* had actually “acknowledged that its  
 27 independent investigation did not permit identification of ‘a specific party that is likely to be the  
 28 infringer.’” *See Id.*

1 **allowed** the subpoena to be issued to the ISP, the ISP to respond and the subscriber to be  
 2 identified. It was only after the subscriber was identified, and it became clear that neither that  
 3 information nor any other information linked the defendant in the case to the infringement, that  
 4 the court found it was improper for the plaintiff to continue to pursue claims against that  
 5 subscriber. That is the reason the Court in *Cobbler* used the words “standing alone” – it is  
 6 confirming that a plaintiff in a BitTorrent infringement case such as this gets to *at least* identify  
 7 the subscriber. If that identity “standing alone” does not support the assertion that the  
 8 subscriber is the infringer, it may not be proper to proceed with a case – **but the default is that**  
 9 **a plaintiff gets to start with that information.** The only way to get that information is  
 10 through the subpoena sought by this motion.

11       Importantly, at this stage of the litigation when Plaintiff does not know Defendant’s  
 12 identity or address, it is impossible to plead any set of facts that would specifically connect  
 13 Defendant to the infringement beyond simply being the subscriber. Without knowing who  
 14 Defendant is, Plaintiff cannot use its evidence to connect Defendant to the infringement. This is  
 15 true of nearly every copyright infringement claim based on infringement through the Internet.  
 16 However, nothing in *Cobbler* nor *Glacier* would indicate the Ninth Circuit sought to prevent  
 17 copyright holders from enforcing Internet piracy. To the contrary, *Glacier* specifically  
 18 recognizes that a case such as this one is true to the purpose of the Copyright Act. “Inherent in  
 19 the Act’s purpose is that ‘a copyright holder has always had the legal authority to bring a  
 20 traditional infringement suit against one who wrongfully copies.’ In the Internet Age, such suits  
 21 ‘have served as a teaching tool, making clear that much file sharing, if done without permission,  
 22 is unlawful[,] and apparently have had a real and significant deterrent effect.” *Glacier Films*  
 23 *(USA), Inc. v. Turchin*, 896 F.3d 1033, 1041 (9th Cir. 2018) (internal citations omitted).

24       As the Northern District of California held, evaluating the impact of *Cobbler* on the  
 25 early stage of copyright BitTorrent cases, “[w]hile the Court is cognizant that an IP address is  
 26 not perfectly correlated to the identity of an alleged infringer because it is possible for a third  
 27

1 party to use a wireless network with or without the subscriber's permission, it is at least if not  
2 more likely that the subscriber is responsible for the alleged infringement in this case where  
3 Plaintiff has isolated 66 separate events where the same IP address was used to infringe its  
4 works.” *Strike 3 Holdings, LLC v. John Doe Subscriber assigned IP address 67.170.214.219*,  
5 No. CV 18-02018-YGR (EDL), \*6–7 (N.D. Cal. Sep. 14, 2018) (attached as Exhibit E).  
6 Likewise, in this case, Plaintiff has alleged Defendant infringed 46 separate motions pictures  
7 spanning over the course of a year. *See* Dkt. 1, Exhibit A.

8 The Northern District of California court further noted that *Cobbler* acts as a procedural  
9 safeguard for Defendant *after Defendant is identified*.

10  
11 The information provided by [Defendant's ISP] is likely to identify the alleged  
12 infringer or help Plaintiff secure the identity of the alleged infringer by asking for  
13 the subscriber's help or conducting its own further investigation of who might be  
14 using the IP address to access the BitTorrent protocol. The Ninth Circuit's recent  
15 decision in *Cobbler Nevada, LLC v. Gonzalez*, 2018 WL 4055766 (9th Cir. Aug.  
27, 2018) ensures that Plaintiff will not be able to rely on a bare allegation that  
Defendant is the registered subscriber of the IP address associated with infringing  
activity.

16 *Strike 3 Holdings, LLC v. John Doe Subscriber assigned IP address 67.170.214.219*, No. CV  
17 18-02018-YGR (EDL), \*6–7 (N.D. Cal. Sep. 14, 2018) (Exhibit E).

18 “To require [Plaintiff] to prove that the subscriber more likely than not is the infringer-  
19 that is, to meet its ultimate burden of proof-at the pleading stage would turn the civil litigation  
20 process on its head; ‘there is no requirement that [Strike 3] present at this stage actual evidence  
21 to support the merits of its infringement allegations.’” *Malibu Media, LLC v. Doe*, No. CV 13-  
22 365 PWG, 2014 WL 7188822, at \*5 (D. Md. Dec. 16, 2014). Accordingly, at this juncture,  
23 Plaintiff has made a prima facie case against Doe Defendant and thus demonstrated good cause  
24 for leave to take early discovery.

1                   4. ***There is a Reasonable Likelihood that Plaintiff Can Identify the Defendant***  
 2                   ***and Effectuate Service***

3                   “While not a factor, the *Columbia Ins.* court also requires Plaintiff to demonstrate that  
 4 the requested discovery will lead to identifying information about Defendants that would make  
 5 service of process possible.” *QOTD Film*, No. CV 2:16-00928-APG-GWF, 2016 WL 8735619  
 6 at \*2 (citing 185 F.R.D. at 580). Plaintiff’s knows that Cox Communications is the owner of  
 7 Defendant’s IP address because Maxmind’s geolocation service has identified Cox  
 8 Communications as the owner. Moreover, the American Registry for Internet Numbers  
 9 (“ARIN”) identifies Cox Communications as the owner of the IP address.<sup>4</sup> See Stalzer  
 10 Declaration; see also *BMG Rights Mgmt. (US) LLC v. Cox Commc'ns, Inc.*, No. CV 16-1972,  
 11 2018 WL 650316, at \*2 (4th Cir. Feb. 1, 2018) (noting “only the ISP can match the IP address  
 12 to the subscriber's identity”). ARIN is a nonprofit, member-based organization, responsible for  
 13 the management and distribution of IP addresses across most of North America, including all of  
 14 the United States.<sup>5</sup>

15                   The subpoena seeks Doe Defendant’s name and address, which are currently unknown  
 16 to Plaintiff. With Defendant’s identity, Plaintiff will be able to amend its complaint to name  
 17 Doe Defendant and with said name and address, will be able to serve a summons upon  
 18 Defendant pursuant to Fed. R. Civ. P. 4(a) and (e) (requiring Plaintiff to name the Defendant  
 19 and effectuate service on that individual). Without the subpoenaed for information, Plaintiff  
 20 cannot properly serve Doe Defendant because it does not know his or her identity.

21                   **C. Protective Order**

22                   In BitTorrent cases involving adult content, courts have found it appropriate to issue a  
 23 protective order establishing procedural safeguards such as allowing a defendant to proceed  
 24 anonymously. See e.g., *Strike 3 Holdings*, No. CV 17-2317-JAH (BLM), 2017 WL 6389848 at  
 25

26  
 27                   <sup>4</sup> <https://whois.arin.net/>

28                   <sup>5</sup> [https://www.arin.net/about\\_us/overview.html](https://www.arin.net/about_us/overview.html)

1 \*3–4 (S.D. Cal. Dec. 14, 2017). Strike 3 respectfully encourages the Court to establish such  
2 procedures here, should the Court find it appropriate.

3 **IV. CONCLUSION**

4 For the foregoing reasons, Plaintiff respectfully requests this Court grant leave to  
5 Plaintiff to issue a Rule 45 subpoena to Defendant’s ISP.

6 Dated this 2<sup>nd</sup> of October, 2018.

7 **FOX ROTHSCHILD LLP**

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